Dr Lourdes Dava Raj a/l Curuz Durai Raj v Dr Milton Lum Siew Wah & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-118–12 OF 2018(W)
TENGKU MAIMUN CHIEF JUSTICE, ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK) AND NALLINI PATHMANTHAN FCJ
29 JULY 2020

Civil Procedure — Judicial review — Party directly and adversely affected by outcome of judicial review ('JR') proceedings not given any notice of the proceedings — Medical doctor filed JR proceedings to quash decision of Malaysian Medical Council ('MMC') not to take any action against fellow doctor ('appellant') on charge of professional misconduct — JR application sought declaration that appellant guilty of charge and that MMC should punish him after hearing his mitigation — Applicant for JR never served relevant cause papers or notice of hearing on appellant as required by O 53 r 4(2) of Rules of Court 2012 — Whether Court of Appeal's decision to grant reliefs sought in JR application without giving appellant chance to be heard in his defence was a nullity — Whether appellant's attendance under protest before MMC to plead in mitigation before being punished not waiver of his right to challenge COA's decision — Whether COA erred in dismissing appellant's application to intervene in concluded appeal proceedings to set aside orders it made — Whether principle of law that intervention would not be allowed after proceedings had concluded did not apply where order sought to be set aside was a nullity

The appellant ('Dr Lourdes') was at the material time the chief medical service officer and person-in-charge of a private hospital where the first respondent ('Dr Milton') was a visiting specialist. For the purpose of improving the medical standards in the hospital, Dr Lourdes circulated to doctors participating in medical and dental advisory committee meetings at the hospital, the clinical case summaries of six patients in order to study the morbidity and mortality situation in those cases. Dr Milton, who was one of those who received the summaries, opined that the disclosure of the summaries breached patient-doctor confidentiality (since prior consent of the patients involved or their next-of-kin had not been obtained) and also breached the Code of Professional Conduct, and guidelines on 'Good Medical Practice' and 'Confidentiality' of the second respondent ('the MMC'). Pursuant to Dr Milton's official complaint, the MMC investigated the matter, considered Dr Lourdes' defence to a charge of 'infamous conduct in a professional respect' and finally decided, by a majority, that Dr Lourdes had no case to answer. Dissatisfied with the outcome, Dr Milton filed judicial review ('JR')

proceedings to quash the MMC's majority decision, declare that Dr Lourdes was guilty of the charge and direct the MMC to impose an appropriate sentence after hearing Dr Lourdes' mitigation. The High Court dismissed the JR proceedings basically on the ground that Dr Milton had no locus to file the proceedings and that even on the merits, he had not shown any good reason why the reliefs he sought ought to be granted. On Dr Milton's appeal, the Court of Appeal ('COA') set aside the High Court's decision and granted the reliefs. Dr Milton had prayed for ('the 27 October 2015 decision'). Since Dr Milton never made Dr Lourdes a party to any of the court proceedings and never served him with any of the cause papers, Dr Lourdes was never heard at the proceedings before the High Court or the COA. Pursuant to the COA's direction, the MMC convened a hearing to hear Dr Lourdes' mitigation and after hearing him (Dr Lourdes attended the hearing under protest) punished him with a reprimand. Pursuant to s 31 of the Medical Act 1971, Dr Lourdes applied to the High Court to set aside the reprimand and declare that he was not bound by the COA's decision as he was never notified of the court proceedings. The High Court dismissed the application holding that it was not the proper forum to challenge the COA's decision and that the COA's decision was set aside, the MMC was bound by it. Dr Lourdes then applied for leave to intervene in the COA proceedings in which the 27 October 2015 decision was made in order to have the decision set aside and to reinstate the MMC's decision acquitting him of the charge of 'infamous conduct'. The COA dismissed the application (against which the instant appeal was filed) on the ground that it was filed inordinately late, that Dr Lourdes had admitted to the charge and waived his rights to challenge it by submitting to the MMC's mitigation hearing and that intervention could not be allowed where proceedings had come to an end. The questions of law on which leave to appeal against the COA's decision was given were: (a) whether an order made in absentia in a judicial review application against a party, who, though directly affected by the application was not served with the relevant cause papers as required by O 53 r 4(2) of the Rules of Court 2012 ('the ROC'), ought to be set aside as of right for breach of the right to be heard; and (b) whether, on the ground that proceedings had come to an end, such a party would, nevertheless, not be allowed to intervene in the proceedings under O 15 r 6 of the ROC to set aside the order. At the instant appeal hearing, the respondents raised the preliminary objection ('PO') that the court had no jurisdiction to hear the appeal as s 96(a) of the Courts of Judicature Act 1964 had not been complied with in that the matter did not arise from a decision of the High Court in its original jurisdiction.

Held, unanimously dismissing the PO, allowing the appeal, setting aside the decision of the COA, granting the prayers sought by Dr Lourdes in his intervention application, answering the first question of law in the affirmative and the second question of law in the negative:

(1) The PO had no merit and had to be dismissed because: (a) the objection that the court had no jurisdiction to hear the appeal should have been raised at the leave-to-appeal stage as the issue of jurisdiction was one which related to a threshold requirement. As leave to appeal was granted, the leave panel had found that the Federal Court did have jurisdiction to hear this matter; and (b) the instant appeal was not concerned with the s 31 appeal by Dr Lourdes against the MMC's decision to reprimand him but with his exclusion from Dr Milton's judicial review proceedings which caused Dr Lourdes to apply to intervene to set aside the COA's 27 October 2015 order (see paras 5–27).

(2) The order of the COA was a nullity because Dr Lourdes was not given the right to be heard. The COA failed to consider the miscarriage of justice Dr Lourdes suffered when it found him guilty and restricted his right to be heard in his defence to only putting in a plea of mitigation before the MMC (see paras 38 & 61).

(3) Dr Milton's judicial review application sought to usurp MMC's power to regulate the conduct of its own members. In granting the reliefs Dr Milton sought in his application, the COA removed from the MMC its power to decide whether the charge against Dr Lourdes had been made out. Dr Milton could have, but did not, pray for the matter to be remitted to a different composition of the Disciplinary Board ('DB') to re-hear Dr Lourdes' defence and make a decision. Instead, he asked the court to step into the DB's shoes and find Dr Lourdes guilty. As correctly stated by the High Court, it was better that the MMC managed the professional conduct of its own members and that the court should not readily interfere with the findings of the MMC unless the decision taken by it was perverse or took into account irrelevant matters or failed to take into account relevant matters or contravened the doctrine of proportionality (see paras 35–36).

(4) The principles of natural justice were not satisfied simply because Dr Lourdes had the opportunity to defend himself in the domestic inquiry proceedings. The right to be heard on the particular facts of the instant appeal extended to all stages of the proceedings which affected him including the judicial proceedings (see para 38).

(5) The principle of law in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 ('Staghorn'), that a party could not intervene in proceedings under O 15 r 6 of the ROC where the proceedings had come to an end, could not be applied to bar Dr Lourdes from intervening to set aside the order of the COA. The principle in *Staghorn* should not apply to court orders which were null because that would be unjust to parties affected by such orders, as was the case with Dr Lourdes. In *Staghorn*, the court found that Staghorn Sdn Bhd had no interest in the land in question. In contrast, Dr

Lourdes was the party most directly affected. He was central to the entire case, yet the finding of innocence against him was reversed without his having had the opportunity to defend himself. This was a serious miscarriage of justice (see paras 39–40 & 43).

(6) The doctrines of res judicata, issue estoppel and abuse of process raised by the MMC had no application in the instant case which concerned a breach of natural justice. Dr Lourdes was expressly excluded from the judicial review proceedings. There was a deliberate act to preclude him from defending himself. This was not a re-litigation of the judicial review proceedings. Rather, Dr Lourdes was seeking to exercise his right to be heard which was denied him in the original judicial review proceedings. Therefore, Dr Lourdes was not attempting to have a second bite at the cherry or to have his matter decided by different judges with a view to procuring a possibly different and more favourable outcome (see paras 51, 56 & 59).

[Bahasa Malaysia summary

Perayu ('Dr Lourdes') pada masa yang material adalah ketua pegawai perkhidmatan perubatan dan ketua hospital swasta di mana responden pertama ('Dr Milton') adalah seorang pakar. Bagi tujuan menaiktaraf standard perubatan di hospital tersebut, Dr Lourdes mengedarkan kepada doktor yang mengambil bahagian dalam mesyuarat jawatankuasa penasihat perubatan dan pergigian di hospital, ringkasan kes klinikal enam pesakit untuk mengkaji keadaan morbiditi dan kematian dalam kes-kes tersebut. Dr Milton, yang merupakan salah seorang dari mereka yang menerima ringkasan tersebut, berpendapat bahawa pendedahan ringkasan tersebut melanggar kerahsiaan pesakit-doktor (oleh sebab persetujuan dari pesakit yang terlibat atau saudara-mara mereka masih belum diperoleh) dan juga melanggar Kod Etika Profesional, dan garis panduan mengenai 'Amalan Perubatan yang Baik' dan 'Kerahsiaan' responden kedua ('MMC'). Berdasarkan aduan rasmi Dr Milton, MMC telah menyiasat perkara tersebut, mengambil kira pembelaan Dr Lourdes atas tuduhan 'etika luar biasa dalam hal profesional' dan akhirnya memutuskan, dengan majoriti, bahawa Dr Lourdes tidak mempunyai kes untuk dijawab. Tidak berpuas dengan keputusan tersebut, Dr Milton memfailkan prosiding semakan kehakiman ('SK') bagi membatalkan keputusan majoriti MMC, membuat deklarasi bahawa Dr Lourdes bersalah atas pertuduhanan tersebut dan mengarahkan MMC untuk menjatuhkan hukuman yang bersesuaian setelah mendengar mitigasi Dr Lourdes. Mahkamah Tinggi menolak prosiding SK pada asasnya dengan alasan Dr Milton tidak mempunyai locus untuk memfailkan prosiding tersebut dan bahawa walaupun berdasarkan merit, beliau tidak mengemukakan alasan yang baik mengapa relif yang dipohon harus dibenarkan. Berdasarkan rayuan Dr Milton, Mahkamah Rayuan ('MR') mengetepikan keputusan Mahkamah Tinggi dan membenarkan relif tersebut. Dr Milton telah memohon

('keputusan 27 Oktober 2015'). Oleh kerana Dr Milton tidak pernah menjadikan Dr Lourdes sebagai pihak dalam mana-mana prosiding mahkamah dan tidak pernah menyerahkan kertas kausa, Dr Lourdes tidak pernah didengar semasa prosiding di Mahkamah Tinggi atau MR. Berdasarkan arahan MR, MMC mengadakan pendengaran untuk mendengar mitigasi Dr Lourdes dan setelah mendengarnya (Dr Lourdes menghadiri perbicaraan dengan bantahan) mengenakan hukuman teguran. Mengikut s 31 Akta Perubatan 1971, Dr Lourdes memohon kepada Mahkamah Tinggi untuk mengetepikan hukuman teguran dan memohon deklarasi bahawa beliau tidak terikat dengan keputusan MR kerana beliau tidak pernah diberitahu mengenai prosiding mahkamah. Mahkamah Tinggi menolak permohonan tersebut dengan menyatakan bahawa ianya bukan forum yang tepat untuk mencabar keputusan MR dan bahawa keputusan MR diketepikan, MMC terikat olehnya. Dr Lourdes kemudian memohon kebenaran untuk intervensi dalam prosiding MR di mana keputusan 27 Oktober 2015 dibuat agar keputusan tersebut diketepikan dan untuk mengekalkan keputusan MMC yang membebaskan beliau dari tuduhan 'etika luar biasa'. MR menolak permohonan tersebut (yang mana rayuan semasa telah difailkan) dengan alasan bahwa ianya telah lambat difailkan, bahawa Dr Lourdes telah mengakui pertuduhan tersebut dan mengetepikan hak beliau untuk mencabarnya dengan mengemukakan pendengaran mitigasi MMC dan intervensi tidak boleh dibenarkan di mana prosiding telah berakhir. Persoalan undang-undang kebenaran untuk memfailkan rayuan terhadap keputusan MR adalah: (a) sama ada perintah yang dibuat in absentia dalam permohonan semakan kehakiman terhadap seseorang pihak, yang, meskipun secara langsung terkesan oleh permohonan tersebut tidak diserahkan dengan kertas kausa sebagaimana yang diperuntukkan oleh A 53 k 4(2) dari Kaedah-Kaedah Mahkamah 2012 ('KKM'), harus diketepikan sebagai hak untuk pelanggaran hak untuk didengar; dan (b) sama ada, dengan alasan bahawa prosiding telah berakhir, pihak tersebut, bagaimanapun, tidak diizinkan untuk intervensi dalam prosiding di bawah A 15 k 6 KKM untuk mengetepikan perintah tersebut. Semasa perbicaraan rayuan semasa, pihak responden telah mengemukakan bantahan awal ('BA') bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar rayuan tersebut kerana s 96(a) Akta Mahkamah Kehakiman 1964 tidak dipatuhi dalam hal perkara tersebut tidak timbul dari keputusan Mahkamah Tinggi dalam bidang kuasa asalnya.

Diputuskan, dengan sebulat suara menolak BA, membenarkan rayuan, mengetepikan keputusan MR, membenarkan relif yang dipohon oleh Dr Lourdes dalam permohonan intervensi beliau, menjawab soalan undang-undang pertama secara afirmatif dan soalan undang-undang kedua secara negatif:

(1) BA tidak bermerit dan harus ditolak kerana: (a) bantahan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar rayuan

seharusnya dibangkitkan pada tahap kebenaran untuk merayu kerana isu bidang kuasa adalah berkaitan dengan syarat bawah. Oleh kerana kebenaran untuk mengemukakan rayuan dibenarkan, panel telah mendapati bahawa Mahkamah Persekutuan mempunyai bidang kuasa untuk mendengar perkara ini; and (b) rayuan semasa tidak berkenaan dengan rayuan s 31 oleh Dr Lourdes terhadap keputusan MMC untuk hukuman teguran tetapi dengan pengecualiannya dari prosiding semakan kehakiman Dr Milton yang menyebabkan Dr Lourdes memohon untuk intervensi bagi mengetepikan perintah MR 27 Oktober 2015 (lihat perenggan 25–27).

(2) Arahan MR adalah batal kerana Dr Lourdes tidak diberi hak untuk didengar. MR gagal mempertimbangkan ketidakadilan yang ditanggung oleh Dr Lourdes apabila mendapati beliau bersalah dan mengekang haknya untuk didengar dalam pembelaannya untuk hanya mengemukakan pengakuan mitigasi di hadapan MMC (lihat perenggan 38 & 61).

(3) Permohonan semakan kehakiman Dr Milton untuk mengatasi kuasa MMC untuk mengawal etika anggotanya sendiri. Dalam membenarkan relif yang dipohon oleh Dr Milton dalam permohonannya, MR telah membuang kuasa daripada MMC dalam memutuskan sama ada pertuduhan terhadap Dr Lourdes telah diputuskan. Dr Milton seharusnya, namun tidak, memohon agar perkara tersebut diserahkan kepada komposisi Lembaga Disiplin ('LD') yang berlainan untuk mendengar kembali pembelaan Dr Lourdes dan membuat keputusan. Sebaliknya, beliau memohon mahkamah untuk menggantikan LD dan mendapati Dr Lourdes bersalah. Seperti yang dinyatakan dengan tepat oleh Mahkamah Tinggi, adalah lebih baik untuk MMC menguruskan etika profesional anggotanya sendiri dan mahkamah tidak boleh dengan mudah mengganggu dapatan MMC melainkan jika keputusan yang diambil olehnya terkhilaf atau mengambil kira perkara-perkara yang tidak berkaitan atau gagal mengambil kira perkara-perkara yang relevan atau melanggar doktrin perkadaran (lihat perenggan 35–36).

(4) Prinsip keadilan semula jadi tidak dipenuhi hanya kerana Dr Lourdes diberi peluang untuk membela diri dalam prosiding siasatan dalaman. Hak untuk didengar mengenai fakta-fakta tertentu rayuan semasa dicapai ke semua peringkat prosiding yang memberikan kesan kepada beliau termasuk proses kehakiman (lihat perenggan 38).

(5) Prinsip undang-undang dalam *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 ('Staghorn'), bahawa pihak tidak dapat campur tangan dalam prosiding di bawah A 15 k 6 KKM di mana prosiding telah berakhir, tidak dapat digunakan untuk melarang Dr Lourdes campur tangan untuk mengetepikan perintah MR. Prinsip dalam *Staghorn* tidak boleh

diguna pakai untuk perintah mahkamah batal kerana ianya akan menyebakan ketidakadilan bagi pihak-pihak yang terkesan oleh perintah tersebut, seperti Dr Lourdes. Dalam *Staghorn*, mahkamah mendapati bahawa Staghorn Sdn Bhd tidak mempunyai kepentingan terhadap tanah yang dimaksudkan. Sebaliknya, Dr Lourdes adalah pihak yang paling terjejas secara langsung. Beliau adalah pusat keseluruhan kes, namun dapatan tidak bersalah terhadapnya dibalikkan tanpa beliau mempunyai kesempatan untuk membela diri. Ini adalah ketidakadilan yang serius (lihat perenggan 39–40 & 43).

(6) Doktrin res judicata, isu estoppel dan penyalahgunaan proses yang dibangkitkan oleh MMC tidak terpakai dalam kes semasa yang berkaitan pelanggaran keadilan semula jadi. Dr Lourdes secara tersirat telah diasingkan dari prosiding semakan kehakiman. Terdapat tindakan yang sengaja dilakukan untuk menghalangnya membela diri. Ini bukan litigasi semula proses semakan kehakiman. Sebaliknya, Dr Lourdes memohon haknya untuk didengar yang mana telah dihalang dalam prosiding semakan kehakiman yang asal. Oleh itu, Dr Lourdes tidak berusaha untuk mendapat manfaat kali kedua atau untuk hal beliau diputuskan oleh hakim yang berlainan dengan tujuan untuk mendapatkan hasil yang mungkin berbeza dan lebih baik (lihat perenggan 51, 56 & 59).]

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] 1 MLJ 169, PC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75, FC (refd)

Bolton v Law Society [1994] 1 WLR 531

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374, HL (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (distd)

FW Goonetilleke v The Medical Council [1911] 1 LNS 12; 12 SSLR 95 (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (distd)

Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 153; [1998] 1 CLJ 405, FC (refd)

North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547, QBD (not folld)

Regina v Rent Officer Service & Anor, ex-parte Muldoon [1996] 1 WLR 1103, HL (distd)

Trikkon Sdn Bhd v Mahinder Singh Dulku (practising at Messrs Mahinder Singh Dulku & Co) [2010] 8 MLJ 239; [2010] 5 CLJ 850, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Medical Act 1971 ss 3, 4, 4A(2)(b), (2)(c), 29(2)(b), 31, 31(2)
Rules of Court 2012 O 15 r 6, O 53 r 4(2)

Appeal from: Civil Appeal No W-02(IM)-1023–06 of 2015 (Court of Appeal, Putrajaya)

Lambert Rasa-Ratnam (Chan Mun Yew with him) (Lee Hishammuddin Allen & Gledhill) for the appellant.
Anita Kaur Randhawa (Phang See Eng with her) (Asbir, Hira Singh & Co) for the first respondent.
Gurdev Singh Bal (Irmohizam, Gurdev & Co) for the second respondent.

Nallini Pathmanathan FCJ:

[1] This appeal raises a conflict between two seemingly contradictory principles which the courts need to balance. Between the policy of avoiding the opening of the floodgates to endless litigation by upholding finality in judicial decisions on the one hand, and on the other, protecting the sacrosanct rights of an affected person to be accorded the right to be heard in his own defence; which should prevail? Ultimately based on the particular facts of the instant appeal, we decided in the interests of the affected person, the appellant before us, whose livelihood would be threatened by the order obtained by the first respondent against him *in absentia*. We append the reasons for our decision below.

SALIENT BACKGROUND FACTS

[2] At the material time, the appellant before us, Dr Lourdes Dava Raj A/l Curuz Durai Raj ('Dr Lourdes') was the Chief Medical Service Officer and person in charge of Assunta Hospital while the first respondent before us, Dr Milton Lum Siew Wah ('Dr Milton') was then a Visiting Consultant Obstetrician and Gynaecologist at the same hospital.

[3] The second respondent before us is the Malaysian Medical Council ('MMC'), a statutory body established pursuant to s 3 of the Medical Act 1971 ('the MA'). The MMC's dual functions are to register medical practitioners and to regulate the practice of medicine (see s 4 of the MA) and in furtherance of its functions, it has the power to regulate the standards of practice as well as the professional conduct and ethics of registered medical practitioners (see s 4A(2)(b) and (c) of the MA 1971).

[4] It is not in dispute that Dr Lourdes circulated clinical summaries of a

A total of six patients to doctors for the purpose of discussion during Medical and Dental Advisory Committee meetings at Assunta Hospital on 23 September 2009 and 9 December 2009. This committee was tasked with studying the morbidity and mortality in those cases with the end aim of improving the standard of medical care in the said hospital.

B

[5] Dr Milton was among the doctors who received the summaries. He took exception to the fact that Dr Lourdes circulated the said documents without a cover of confidentiality and without informing the committee that the prior consent from the patients or their next-of-kin had been obtained. This, he C contended, was a breach of confidentiality and a violation of section 2.2.2 of the MMC's Code of Professional Conduct, section 3.2 of the MMC's Guideline 'Good Medical Practice' and sections 1, 2, 8d and 9 of MMC's Guideline 'Confidentiality'. He complained to the then President of the MMC, Tan Sri Dr Hj Mohd Ismail Merican, in a letter dated 31 December D 2009.

[6] Based on Dr Milton's complaint, the Preliminary Investigation Committee I of the MMC charged Dr Lourdes with infamous conduct in a E professional respect, as informed in the letter dated 25 March 2013. In the same letter, Dr Lourdes was requested to elect either to state his defence before the said Preliminary Investigation Committee or to have the matter referred to the Malaysian Medical Council for an inquiry. He chose the former and the inquiry was held on 20 May 2014.

F

[7] Before the inquiry, Dr Lourdes affirmed a statutory declaration on 19 May 2014. He explained that he had been newly appointed as the person in charge of the hospital at the material time, and only realised that he may have breached the confidentiality requirement when Dr Milton raised this issue G during the second meeting on 9 December 2009. He averred that thereafter, he stopped doing so and endeavored to strictly adhere to the guidelines and relevant legislation.

[8] In his defence, he averred that it was the doctors attending the committee H meeting who requested the clinical summaries of the presenting doctors prior to the meeting. Despite being aware of doctor-patient confidentiality, he did not realise it was applicable in the context of a mortality and morbidity assessment meeting. He asserted that he disclosed patient names not with any mala fides, but did so in the interests of continuing medical education. He I therefore contended that such an inadvertent act would not amount to 'infamous conduct in a professional respect'.

[9] On 20 May 2014, the inquiry was carried out. By a majority, the MMC found that Dr Lourdes had no case to answer. However, they noted that there

were lapses and deficits in relation to handling documents in the hospital and advised him to improve this. Dr Lourdes was officially informed of this by way of a letter dated 12 June 2014 from the then President of the MMC, Datuk Dr Noor Hisham Abdullah.

[10] To the knowledge of Dr Lourdes, the matter ended there. However, Dr Milton was dissatisfied with the outcome of the inquiry and proceeded to institute judicial proceedings, as set out below.

THE PROCEEDINGS

[11] The chronology of the judicial and disciplinary proceedings in this matter are set out at length below as the first respondent defended the appellant's present appeal on the grounds of, inter alia, delay and res judicata. As such it is important to appreciate the detailed chronology of events to comprehend why we did not concur with the first respondent's stance.

THE HIGH COURT

[12] On 26 August 2014, Dr Milton was granted leave to institute judicial review proceedings for an order of certiorari against the MMC's majority decision that no case had been made out against Dr Lourdes. Dr Milton sought additionally, a declaration that Dr Lourdes was guilty of the charge against him and that the MMC be ordered to hear his plea in mitigation and for the imposition of an appropriate sentence. It is of considerable significance that Dr Milton filed the judicial review application only against MMC, and did not include Dr Lourdes as a party.

[13] The High Court dismissed Dr Milton's judicial review application with costs of RM10,000. The learned judge however failed to address or discuss the failure to include Dr Lourdes as a party to the judicial review proceedings. Instead, the thrust of the judgment centred on the premise that Dr Milton had no locus to institute the proceedings as he was not a person adversely affected by the decision of MMC. As he had brought the proceedings to assert public rights and/or the preservation of the public confidence in the medical profession, the judge held that the proper party to institute proceedings was the attorney general, who is properly vested with power to assert a public right by way of public law litigation. On that ground alone, Dr Milton's case, it was held, ought to be dismissed.

[14] The judge went on to deal with the merits of the judicial review application. Firstly, Her Ladyship found that Dr Lourdes had not expressly admitted to the charge against him. Secondly, Dr Milton had failed to show that the decision of the MMC was tainted with illegality, irrationality,

procedural impropriety, or that irrelevant matters had been taken into consideration and/or that relevant matters had not been taken into consideration. Hence, there was no basis for the court to interfere with the majority findings by the MMC that Dr Lourdes was not guilty of the charge against him.

THE COURT OF APPEAL

[15] Dr Milton succeeded in his appeal to the Court of Appeal. On 27 October 2015, the Court of Appeal allowed Dr Milton's appeal, set aside the High Court decision, and granted the order of certiorari as well as the declaration sought by Mr Milton to the effect that Dr Lourdes was guilty of the charge of a breach of confidentiality. It remained for the MMC to hear Dr Lourdes' plea in mitigation and punish him. Of particular significance once again, is that Dr Lourdes was not heard in his own defence at the hearing of the appeal before the Court of Appeal, because he had not been made a party to those judicial review proceedings.

[16] As directed by the Court of Appeal, on 21 June 2016, the MMC convened the mitigation hearing. There is no dispute that Dr Lourdes was accorded the right to be heard at this stage and was represented by counsel. It is noteworthy that no attempt was made at this stage by Dr Lourdes to dispute or set aside the orders made in the judicial review proceedings, despite not having been heard.

MMC'S HEARING ON MITIGATION AND PUNISHMENT

[17] At the outset of the mitigation hearing, Dr Lourdes' counsel, Ms Shanti Abraham made several preliminary objections. Of relevance to the present appeal is the objection that Dr Lourdes was not bound by the decision of the Court of Appeal, as he was not a party to the court proceedings. She placed on record that she and her client attended the mitigation hearing under protest. She also raised other pertinent issues which severely prejudiced Dr Lourdes.

[18] The MMC imposed the punishment of reprimand on Dr Lourdes.

APPEAL AGAINST MMC'S DECISION BY DR LOURDES

[19] In response to the punishment meted out by the MMC, Dr Lourdes filed an originating summons under s 31 of the Medical Act 1971 seeking to set aside the reprimand and to obtain a declaration that since he was not a party to the Court of Appeal proceedings, he was not bound by the Court of Appeal decision dated 27 October 2015.

[20] The High Court dismissed Dr Lourdes' originating summons. However, Dr Lourdes did not further appeal to the Court of Appeal. The High Court decided so on the grounds that the MMC was bound by the decision of the Court of Appeal until it was set aside, and that the High Court was not a suitable avenue to challenge a decision of the Court of Appeal.

[21] Dr Lourdes then appealed to the Court of Appeal, but in the proceedings pursuant to which the Court of Appeal order dated 27 October 2015 was issued. He sought leave of the court to intervene in the Court of Appeal proceedings and to set aside the Court of Appeal order dated 27 October 2015.

THE DECISION OF THE COURT OF APPEAL

[22] In summary, the Court of Appeal held that:

(a) there was inordinate delay in the filing of the motion, that delay extending to almost two years after the first order of the Court of Appeal, finding Dr Lourdes guilty of the charge (the Court of Appeal did not consider nor give weight to the subsequent events that occurred during the two year period);

(b) there was waiver by Dr Lourdes in attending the plea in mitigation hearing before the MMC (the Court of Appeal failed to consider or give weight to the numerous preliminary objections made by counsel before the MMC, and the express stipulation that participation was without prejudice to steps taken to defend or set aside the order made against Dr Lourdes);

(c) Dr Lourdes had admitted to the charge (the Court of Appeal failed to consider that he had only admitted to the circulation of the information to a limited number of persons for a limited and legitimate purpose. He had not admitted to breaching patient confidentiality per se);

(d) there was no prejudice to Dr Lourdes; and

(e) applying *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 (FC) ('Staghorn'), the Court of Appeal concluded that intervention should not be allowed where proceedings have come to an end (the Court of Appeal failed to consider the breach of natural justice arising from the failure to include Dr Lourdes as a party to the judicial review proceedings initiated by Dr Milton).

[23] The Court of Appeal therefore found no merits in the motion and dismissed his application to intervene. That decision led to the present appeal before us.

[24] The Federal Court granted leave on the following questions of law:

The First Question of Law

Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 and ought to be set aside as of right, in a case where the person directly affected:

(a) is not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012*; and*

(b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

The Second Question of Law

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622, that intervention under Order 15 Rule 6 of the Rules of Court will not be allowed where proceedings have come to an end, apply to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

OUR ANALYSIS OF THE SUBMISSIONS BEFORE THE FEDERAL COURT

The preliminary objection

[25] We will briefly deal with the preliminary objection raised by the respondents that the Federal Court has no jurisdiction to hear this appeal as this matter did not arise from a decision of the High Court in its original jurisdiction. First, such an objection should have been raised at the leave stage as the issue of jurisdiction is one which relates to a threshold requirement. As leave has been granted, it is apparent that the leave panel considered that the Federal Court did in fact have jurisdiction to hear this matter.

[26] Secondly, we are of the view that the respondents ought not to lose sight of the fact that for the purposes of this appeal, the relevant matter in the High Court is not the s 31 appeal by Dr Lourdes as to the reprimand imposed upon him by the MMC, *but the judicial review proceedings filed by Dr Milton to obtain an order of certiorari against the MMC's finding of no case to answer and declaratory relief.* The motion to intervene and set aside the Court of Appeal order dated 27 October 2015 was not filed in the s 31 appeal proceedings.

[27] Moreover, it is not in dispute that there was no appeal against the High Court decision to dismiss the appeal on 22 August 2017. It can be seen from the case number under which Dr Lourdes filed motion encl 7(a) that it was filed in the appeal arising out of the High Court decision to dismiss Dr Milton's judicial review application. It is trite that judicial review proceedings are appealable to the Federal Court. The preliminary objection was therefore dismissed.

The first question of law

[28] In the first question of law, Dr Lourdes relied on the case of *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (FC) ('Muniandy') to urge the court to recognise that it is a breach of natural justice not to accord Dr Lourdes the right to be heard. *Muniandy* is authority for the well-settled principle of law that an order made against a party in breach of his fundamental right to be heard is a breach of natural justice. It renders the order a nullity and is liable to be set aside. The first respondent's counsel argued that *Muniandy* could be distinguished on its factual matrix from the present case.

[29] Counsel for the appellant argued that although *Muniandy* was decided in relation to different facts which raised different provisions of law from the present case, the court ought to similarly recognise that all parties directly affected ought to be served with cause papers and heard. This is also a statutory requirement under O 53 r 4(2) of the Rules of Court 2012 ('the RC'), which is set out below for ease of reference:

> O 53 r 4 Notice
>
> (1) Where leave has been granted under this rule, the applicant shall, within fourteen days after the grant of such leave, file a notice in Form 110.
>
> (2) Upon extraction of the sealed copy of Form 110, *the applicant shall serve* a copy of the same together with a copy of the statement and all affidavits in support *on all persons directly affected by the application not later than fourteen days before the date of hearing specified in the Form 110.* (Emphasis added.)

[30] The counsel for the appellant contended, in our view quite rightly, that Dr Lourdes is a person directly affected by the judicial review application by Dr Milton because:

(a) the prayers seek to overturn the MMC's majority decision that Dr Lourdes was not guilty of the charge against him; and

(b) find him guilty of the charge; and

(c) convene to hear his plea in mitigation.

[31] We are of the view that where the livelihood of a person is at stake, that person ought to be accorded all the rights he is entitled to, paramount of which is the right to be heard in his own cause, to be accorded a fair hearing and given the opportunity to defend himself against the charge proffered against him.

[32] In this regard, it is untenable to contend that Dr Lourdes was directly affected by the decision of the MMC but not directly affected by the decision of the Court of Appeal. The first respondent claimed that the MMC, which imposed punishment on Dr Lourdes, is an intermediary agency, citing the case of *Regina v Rent Officer Service & Anor, ex-parte Muldoon* [1996] 1 WLR 1103 ('Muldoon') which concerned a provision equivalent to our O 53 r 4(2) of the RC 2012.

[33] *Muldoon* is distinguishable on the following basis. The facts of that case pertained to judicial review sought by citizens who wanted the Liverpool City Council to determine their housing benefit claims. The party who sought to be added as a party to the proceedings was the Secretary of State for Social Security. In that case, the House of Lords found that the Secretary could not be said to be a person directly affected by the decision of the Liverpool City Council as he was, in the words of Lord Keith of Kinkel at p 1105, 'only indirectly affected, by reason of his collateral obligation to pay subsidy to the local authority'.

[34] We are of the view that the consequence of the Secretary not being added as a party to the proceedings cannot be equated to Dr Lourdes whose very livelihood and reputation is directly affected by the decision of the Court of Appeal. The Secretary's only concern was the increase in amount of subsidies he might have to pay to local authorities. Therefore he is 'indirectly affected' as his concern is related to state money, not his own, although he is acting in the interest of the state. On the other hand, Dr Lourdes is personally affected by the judicial review proceedings instituted by Dr Milton and is therefore directly affected.

[35] It is untenable for the first respondent to contend that Dr Lourdes would not be directly affected when his name appears in the order of the Court of Appeal. The order sought by Dr Milton effectively usurps the power of the MMC to regulate the conduct of its own members as the court order in his favour removes from the MMC its power to decide on whether the charge against Dr Lourdes has been made out. Hence, we rejected this submission.

[36] We also noted that Dr Milton did not pray for the matter to be remitted for a different composition of the Disciplinary Board to re-hear Dr Lourdes' defence and make a decision, which he could have very well prayed for. Instead, Dr Milton asked the court to step into the shoes of the Disciplinary Board

composed of doctors tasked with overseeing and regulating MMC's own members, of the medical profession, and find Dr Lourdes guilty. As correctly stated by the High Court, it is better for a professional body such as the MMC to manage its own members in relation to their conduct, so the court should not readily interfere with findings by the MMC, unless the decision is perverse or takes into account irrelevant matters or fails to take into account relevant matters, or contravenes the doctrine of proportionality (see *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] AC 374).

[37] We are in agreement with the view of the High Court which is based on case law such as the Privy Council case of *FW Goonetilleke v The Medical Council* [1911] 1 LNS 12; 12 SSLR 95 (Straits Settlements Law Reports dated 31 December 1911); the High Court case of *Trikkon Sdn Bhd v Mahinder Singh Dulku (practising at Messrs Mahinder Singh Dulku & Co)* [2010] 8 MLJ 239; [2010] 5 CLJ 850 and the English case of *Bolton v Law Society* [1994] 1 WLR 531 ('Bolton') which was held to be of persuasive value by the Malaysian Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405 ('Ng Hock Cheng'). The reason why *Ng Hock Cheng* did not adopt *Bolton* was because it was decided in relation to a professional body, where the Disciplinary Tribunal had punished a solicitor who breached the Law Society rules, but *Ng Hock Cheng* related to dismissal of a government servant after disciplinary proceedings were instituted by the Public Services Commission.

[38] The second respondent's counsel submitted that there was no prejudice to Dr Lourdes not being given notice of the judicial review proceedings and/nor the opportunity to be heard at the same, on the basis that Dr Lourdes was heard before the Preliminary Inquiry Committee and the MMC, and the record of the proceedings before the MMC was before the High Court and Court of Appeal in the judicial review proceedings. We reject this contention as the principles of natural justice are not satisfied by reason of Dr Lourdes having the opportunity to defend himself in the domestic inquiry proceedings. The right to be heard on the particular facts of the instant appeal, extended to all stages of the proceedings which affected him, and this includes the judicial proceedings. The Court of Appeal, with respect, erred in not considering the miscarriage of justice suffered by Dr Lourdes when it imposed a finding of guilt on him and restricted his right to be heard in his defence to only putting in a plea of mitigation before the MMC.

The second question of law

[39] In the second question of law, the counsel for Dr Lourdes contended that the principle in the case of *Staghorn* ought not apply to bar Dr Lourdes

from applying to intervene to set aside the order of the Court of Appeal. The Federal Court held in *Staghorn* that an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes functus officio. The Federal Court emphasised that just because the court is of the view that the order made earlier had caused injustice, it does not mean that the order to intervene should be given as the requirements of O 15 r 6 of the Rules of Court 2012 still have to be satisfied.

[40] The principle in *Staghorn* should not apply to court orders which are null, because that would then be unjust to parties affected by such orders, as was the case with Dr Lourdes.

[41] We shall discuss the facts of *Staghorn* and proffer our reasons as to why it is inapplicable to the present case. The subject matter at stake in *Staghorn* was a piece of land which a company had charged to Hong Leong Bank as security for a loan. The company defaulted in the repayment of the loan and Hong Leong Bank took steps to realise the security. It obtained an order for sale from the court and the land was sold by public auction. More than two years after the public auction of the land, Staghorn Sdn Bhd applied to intervene to set aside the order for sale and the public auction. This was because after the company charged the land to Hong Leong Bank, the two registered proprietors of the land executed a sale and purchase agreement to sell the same land to Staghorn Sdn Bhd and Staghorn appointed Teck Lay Realty Sdn Bhd as the nominee for the purchase.

[42] A perusal of the case discloses that the primary reason for the decision is that Staghorn Sdn Bhd did not have any interest in the land, having nominated Teck Lay Realty Sdn Bhd in this regard. Staghorn Sdn Bhd's name was not on the land title (for that matter, neither was the name of Teck Lay Realty Sdn Bhd) and it accordingly had no interest in the land for the court to allow it to intervene and become a party to the foreclosure proceedings, which were already functus officio by that time. Since the public auction was successful, Staghorn could not assert rights superior to the purchaser who enjoyed an indefeasible title.

[43] Therefore, in *Staghorn*, the issues of an affected party not being given notice, and not being accorded the opportunity to be heard in his own defence did not arise in the same manner as in the present appeal. In *Staghorn*, this court found that Staghorn Sdn Bhd was not an interested party by reason of it having no interest in the land. Here Dr Lourdes was a party most directly involved as the entire proceedings emanated from an allegation of professional

misconduct on his part. He was central to the entire case and his exclusion from participation in one of the most important aspects of adjudication resulted in the reversal of a finding of innocence, without his having been heard in his own defence at all. A clearer case of a breach of one of the most fundamental rules of natural justice is rarely seen, and that rule is the right to be heard (see *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 1 MLJ 169(PC) 2 April 1962 per Denning LJ). This resulted in a serious miscarriage of justice.

[44] We have found above that Dr Lourdes is an affected party. We are therefore of the view that *Staghorn* is inapplicable to the factual matrix of the present case as the facts, law and considerations differ were entirely different and distinguishable there. *Staghorn* also was decided on the considerable length of time it took for Staghorn Sdn Bhd to apply to intervene. That is not the case here, as Dr Lourdes had no notice whatsoever of the judicial review filed by Dr Milton, until MMC took steps to carry out the order of the Court of Appeal and convened to hear Dr Lourdes' plea in mitigation. There was no delay on Dr Lourdes' part.

Ancillary issues

[45] One ancillary issue that requires addressing is the reason why Dr Lourdes did not appeal the High Court decision that a s 31 appeal cannot be an avenue to challenge the Court of Appeal order. The answer proferred was twofold — first, the High Court held that Dr Lourdes ought to set aside the Court of Appeal order, and that is what he proceeded to act on.

[46] Secondly, s 31(2) of the Act at the material time provided that the decision of the High Court was final. Section 27 of Act A1443 deleted sub-s (2) of s 31 of the principal Act, therefore removing the restriction on appealing orders of the High Court in respect of s 31 appeals. Act A1443 only came in to force on 1 July 2017 by virtue of the *gazette* PU(B) 333/2017. It must be pointed out that this was two months before the decision of the High Court on 22 August 2017, so that Dr Lourdes could have appealed, had he wished to do so.

[47] Having considered the chronology of events and the relevant law, we concluded that Dr Lourdes ought not to have been shut out of intervening to set aside the Court of Appeal order, reversing the finding of innocence made against him. The refusal of the Court of Appeal to do so by the application of *Staghorn* is, with respect, erroneous. This is one of those rare cases that fall within the ambit of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75 ('Badiaddin'). The intervention of the court is necessitated by a serious miscarriage of justice

A arising as a consequence of a breach of natural justice. We therefore proceeded to hear the substantive merits of Dr Lourdes' appeal.

The merits of Dr Lourdes' appeal

B **[48]** The appellant's counsel reiterated their position from the start, that Dr Lourdes had never admitted to the charge against him. He admitted distributing the patients' clinical summaries but asserted that it was an honest mistake and so could not have amounted to infamous conduct in a professional respect.

C

[49] The second respondent's counsel argued for a broader application of the principle of res judicata by extending it to bind non-parties. He argued that even though Dr Lourdes was not a party to the proceedings in the courts below, it would be an abuse of process to allow him to relitigate the matter. He D contended that since the same facts are involved as the original suit, the doctrine of estoppel per rem judicatum applies to bar Dr Lourdes from bringing this appeal.

E **[50]** This is a tangled web which we must unweave. It is apparent from the submissions of the second respondent's counsel here, as well as in putting forth their preliminary objection on the issue of jurisdiction, that they have confused the High Court judicial review proceedings filed by Mr Milton with the High Court proceedings in relation to the s 31 appeal filed by Dr Lourdes in relation F to the MMC's decision to impose a reprimand upon him. We reiterate here, as we have done above under our discussion of the preliminary objection raised by the respondents, that these two proceedings are clearly not the same.

G **[51]** First of all, Dr Lourdes is not filing a new judicial review action in respect of the MMC's finding of no case to answer in respect of Dr Milton's complaint. Dr Lourdes filed an application to intervene in the Court of Appeal proceedings since Dr Milton did not add him as a party to the original judicial review. Therefore, Dr Lourdes is not attempting to have a second bite at the H cherry and have his matter decided by different judges with a view to procure a possibly different and more favourable outcome. This is not, as contended by the second respondent's counsel, a re-litigation of the judicial review proceedings.

I **[52]** Secondly, we refer to the case which the second respondent's counsel relied on, *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122 ('Dato' Sivananthan') where the Court of Appeal referred to the decision of Drake J in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 ('North West'). We are of the view that these cases are inapplicable

because the point of law in the instant appeal is different from that considered in those cases.

[53] In *North West*, the first action was brought by victims of an explosion against three parties: the water authority, the contractors of the system and the consultant engineers (ie Binnie & Partners). The High Court found all three parties liable but the Court of Appeal held that the consultant engineers were wholly liable. That judgment was a final judgment.

[54] The second action in *North West* was brought by the water authority to recover damages against the consultant engineers for losses it had suffered. The consultant engineers sought to adduce fresh evidence to deny negligence. It was in this regard that the water authority raised the doctrine of estoppel to say that although the plaintiffs in the first action, ie the victims of the explosion, were not parties to the second action, estoppel would still apply in the second action to prevent the consultant engineers from adducing fresh evidence to deny negligence. The rationale is that the finding of negligence against the consultant engineers is final and binding and no evidence could be now brought to alter that finding. That finding of negligence could not be re-litigated a second time.

[55] We note that in the present proceedings, Dr Lourdes is not seeking to adduce fresh evidence to re-litigate the judicial review proceedings. He is seeking to intervene to be heard in respect of the finding of guilt made against him in his absence in the judicial review proceedings. Therefore it is clear that the decision in *North West* is wholly inapplicable to this appeal.

[56] *North West* deals with an attempt to re-litigate a final finding of negligence against a party, whereas in the instant appeal, the appellant is seeking to exercise his right to be heard which was denied in the original judicial review proceedings.

[57] Dr Lourdes although having had the opportunity to defend himself before the MMC, was not made a party in the judicial review proceedings before the High Court and Court of Appeal, and this failure to add him as a party precluded him from articulating his own defence before the courts. He was excluded to his detriment. We have stated above that the right to be heard is not restricted to merely domestic inquiry proceedings but extends to all available avenues of appeal. Dr Lourdes not being joined as a party at the High Court and Court of Appeal levels, is a matter of serious detriment to him, particularly when the Court of Appeal made a finding of guilt on his part. Dr Lourdes is without question an affected party, and thus pursuant to O 53 r 4(2) of the RC 2012, he was entitled to notice of the judicial review proceedings so that he could be heard in his own defence.

[58] The case of *Dato' Sivananthan* can be distinguished from the present case as the matter at stake there was a particular monetary sum paid in expectation of a joint venture agreement which failed. The rightful recipient of the monetary sum was sought to be determined in two different proceedings, which in itself amounted to a duplicity of proceedings. Not unexpectedly, the outcome of the two different proceedings resulted in conflicting decisions as the plaintiffs and defendants of the two cases were different. When the respective plaintiffs succeeded in summary judgment applications, naturally the outcome was that different defendants were held to be liable to pay the same sum to different plaintiffs. It is evident that the factual matrix of that case is wholly different from the present appeal. As such the case is inapplicable.

[59] The facts here are entirely different. This is a case involving a breach of natural justice, rather than res judicata or issue estoppel. This in turn is because the adjudication of the substantive dispute was conducted in the absence of a primary actor. It is again different from a default situation because Dr Lourdes was expressly excluded from the judicial review proceedings. This amounted to a deliberate act to preclude him from defending himself. This takes it out of the purview of the doctrine of res judicata, issue estoppel and abuse of process. We are therefore of the view that *Dato' Sivananthan* is distinguishable from the facts of this appeal.

CONCLUSION

[60] In summary, there were three decisions we made at the close of submissions. First, we dismissed the preliminary objection of both respondents that s 96(a) of the CJA 1964 had not been complied with.

[61] Secondly, on the appeal proper, we unanimously decided that the order of the Court of Appeal was a nullity because the appellant was not given the right to be heard. We therefore allowed the appeal and set aside the order of the Court of Appeal. For avoidance of any doubt, we reiterate that we had answered the first question of law in the affirmative and the second question of law in the negative. For clarity, we set out the questions in full below.

The first question of law:

> Where at the hearing of an application for judicial review an adverse order is made against a person directly affected by the application, whether the order is a nullity within the meaning of the decision in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 *and ought to be set aside as of right, in a case where the person directly affected:*

(a) is not served Form 110, the statement and all affidavits in support or notified of the application and date of hearing, in breach of the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012; and

(b) was consequently deprived of his right to be heard at the hearing at which the adverse order was made against him, in breach of the rules of natural justice.

Answer: Affirmative

The second question of law:

If the answer to Question 1 is in the affirmative, whether the principle in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622 (FC), that intervention under Order 15 Rule 6 of the Rules of Court will not be allowed where proceedings have come to an end, apply to a case where the order is a nullity for breach of the rules of natural justice and the mandatory requirements of Order 53 Rule 4(2), Rules of Court 2012 and intervention is sought for the purpose of setting aside the order.

Answer: Negative

[62] Finally, in respect of the notice of motion to intervene in the Court of Appeal (encl 7a), we allowed prayers 2(a), (b) and (c) which are summarised as follows:

(a) the order of this court dated 27 October 2015 is set aside;

(b) all steps and any action taken by the respondents pursuant to the order of this court dated 27 October 2015 is set aside, and any endorsement of the decision and order of the respondents on the Malaysian Medical Registry is nullified; and

(c) The decision and order of the respondents dated 20 May 2014 to dismiss the charge against the proposed intervener for wrongful behavior in any professional sense under s 29(2)(b) of the Medical Act 1971 is reinstated.

[63] We award costs of RM40,000 against each of the respondents subject to allocatur fees. The deposit, if any, is to be refunded to the appellant.

Order accordingly.

Reported by Ashok Kumar